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7 THOMAS FAN,  
8 Plaintiff,  
9 v.  
10 NBA PROPERTIES INC., *et al.*,  
11 Defendants.

Case No. 23-cv-05069-SI

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**ORDER GRANTING PLAINTIFF'S  
MOTION FOR LEAVE TO FILE  
THIRD AMENDED COMPLAINT AND  
GRANTING MOTION TO SEAL**

17 Re: Dkt. Nos. 80, 81

18 Plaintiff's motion for leave to file a third amended complaint is scheduled for a hearing on  
19 November 8, 2024. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matter is  
20 appropriate for resolution without oral argument and VACATES the hearing. For the reasons set  
21 forth below, the Court GRANTS the motion. The Court also GRANTS the administrative motion  
22 to file the third amended complaint with limited redactions.

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28 **DISCUSSION**

29 Plaintiff Thomas Fan seeks leave to file a third amended complaint to add two additional  
30 class representatives. Fan states that during the course of gathering evidence for this case, he learned  
31 that third party Meta Platforms Inc. ("Meta") may have lost or deleted data that Meta collected from  
32 his activities on defendants' NBA Top Shop website. *See generally* Bogdanovich Decl. ¶¶ 5-14 &  
33 Ex. B-E (Dkt. No. 81-1). Fan seeks to add two class representatives whose data may not have been  
34 lost or deleted.

35 Defendants oppose Fan's motion, contending that it is brought "at the eleventh hour" and  
36 that defendants will be prejudiced by the amendment. Defendants also contend that that Fan lacks  
37 standing and the case should be dismissed. In addition, defendants assert that Fan and his counsel  
38 should have known about the evidentiary issues prior to filing the complaint and therefore have

1 acted in bad faith and unduly delayed, and that any amendment would be futile.

2 Rule 15(a)(2) instructs the Court to “freely” grant a motion to amend pleadings unless (1)  
3 doing so would prejudice the opposing party; (2) the amendment is sought in bad faith; (3) the  
4 amendment causes undue delay; or (4) the proposed amendment would add a futile claim.  
5 *AmerisourceBergen Corp. v. Dialysisist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006). “Rule 15(a) is  
6 very liberal and leave to amend ‘shall be freely given when justice so requires.’” *Id.* (quoting *Bowles*  
7 *v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999)). The opposing party bears the burden to show why  
8 leave to amend should not be granted. *Genentech, Inc. v. Abbott Labs.*, 127 F.R.D. 529, 530 (N.D.  
9 Cal. 1989).

10 The Court concludes that Fan should be granted leave to amend and that defendants’ have  
11 not met their burden to defeat amendment. As an initial matter, the motion was not brought “at the  
12 eleventh hour.” Fan filed the motion on the day the Court set as the deadline for amendment of  
13 pleadings, and this case is still in a relatively early stage of litigation, with the non-expert discovery  
14 cut-off set for April 2, 2025. *Cf. Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980,  
15 986 (9th Cir. 1999) (“A need to reopen discovery and therefore delay the proceedings supports a  
16 district court’s finding of prejudice from a delayed motion to amend.”). Further, the amendment  
17 does not prejudice defendants because the additional class representatives assert the same claims as  
18 Fan and the proposed amendment does not add any new causes of action.

19 Defendants contend that Fan lacks standing because “by his own admission” he “does not  
20 have any evidence that he had Facebook and the NBA Top Shop website open at the same time  
21 when he purchased NBA Top Shot Moments from Dapper.” Defs’ Opp’n at 2. However, as Fan  
22 notes, prior to filing this litigation Fan took a screenshot from his Facebook page showing that  
23 Facebook represented that it had collected 3 separate interactions from nbatopshot.com. *See*  
24 Bogdanovich Decl. Ex. B. Fan has alleged that defendants improperly disclosed his private  
25 information to Meta, and the screenshot is evidence in support of those allegations. This is sufficient  
26 to confer standing. *See Salazar v. Nat'l Basketball Ass'n*, No. 23-1147, \_\_\_ F.4th \_\_\_, 2024 WL  
27 4487971, at \*7 (2d Cir. Oct. 15, 2024) (“[W]e similarly have ‘no trouble’ holding here that Salazar’s  
28 alleged harm is sufficiently concrete to withstand dismissal. . . . Salazar’s core allegation is that his

1 personally identifiable information was exposed to an unauthorized third party. . . . And Salazar  
2 doesn't just allege that his data was exposed to a third party; rather, he asserts that it was disclosed  
3 as a result of an arrangement between the NBA and Meta pursuant to which the NBA deliberately  
4 uses the Facebook Pixel.") (internal citations omitted).

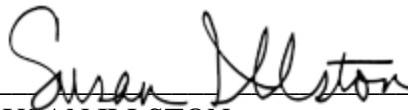
5 The Court finds defendants' remaining arguments unpersuasive. The Court finds no  
6 evidence of bad faith or delay on the part of Fan or his counsel. The record shows that as soon as  
7 Fan learned that Meta may have deleted his information, he notified his counsel, who promptly filed  
8 the current motion. Plaintiff and his counsel also assert that Fan was vetted prior to the filing of this  
9 lawsuit and that based on the screenshot Fan took of his Facebook page, Fan and his lawyers  
10 believed that Meta possessed the data related to Fan. As to futility, plaintiff has submitted  
11 information showing that Meta received data from nbatopshot.com regarding the two new proposed  
12 class representatives as recently as September 8, 2024 and June 20, 2024, and plaintiff asserts that  
13 those facts, combined with the litigation hold letter recently sent to Meta, make it much more likely  
14 that Meta still possesses the data regarding the two new class representatives.

15 Accordingly, the Court GRANTS plaintiff's motion for leave to file the proposed third  
16 amended complaint. Plaintiff shall file the complaint within 2 days of the filing of this order.  
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18 **IT IS SO ORDERED.**

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20 Dated: October 30, 2024

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SUSAN ILLSTON  
United States District Judge